Supreme Court, U.S.
FILED

97-73 JUN 30 1997

OFFICE OF THE CLERK

Petition for Writ of Certiorari

No.__

In the

SUPREME COURT OF THE UNITES STATES

October Term, 1996

Wesley Darling; David Erik Lewis, *Petitioner,*

v.

MacPherson, Inc., Realtor, a Washington Corporation; Scott W. MacPherson; Douglas MacPherson; Bruce MacPherson; Murdoch MacPherson; Alfred Mus

Respondents.

On Petition for a Writ of Certiorari from the State of Washington Supreme Court
to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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JUNE 1997

20 pp

The Questions brought forth by Ruling of the Supreme Court of Washington
Filed April 8, 1997 by C.J. MERRITT, CLERK

1. Is Judicial Bias and admitted being under the Influence of the Defendants ***Lack of Due Process and Violation of the Plaintiffs Civil Rights?***

2. Is Judicial hiding of ***Personal Employment*** by the *"Independent Personal Stake"* of Defendants ***Lack of Due Process when he worked for this entity during the period of the lawsuit be fore him?***

3. Is Judicial Ruling that Real Estate agents are Employee for Antitrust and Consumer Protection Issues regardless of " Independent Personal Stakes", which the Judge ruled essential defunct, being contrary to the record or Sworn Documents which were denied to add to the File by State Court of Appeals and State Supreme Court ***Lack of due Process?***

4. Is the law 28 USC 455 1(b) applicable here?

5. Is the law RCW 2.28.030 requiring disclosure of personal interest meet here?

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The date on which the Supreme Court of Washington in our case was April 2, 1997 denial of Review, and Court of Appeals became the terminating review on April 10,1997. The court case numbers are No. 34479-0-I, and Superior Court No. 92-2-03364-8

The jurisdiction of this Court is invoked under U.S.C. 1254 (1).

Citings

Holter v. Moore 702 F.2d 854	3
Harstad v. Frohl 41 Wn. App. 294, 704 P.2d 501	3
U.S. v. Olander, 584 F.2d 876, certiorari granted and vacated Harrington v. U.S., 99 S.Ct. 3104, 443 U.S. 914, 61 L.Ed.2d 878, Dolman v. U.S., 99 S.Ct. 3104, 443 U.S. 914, 61 L.Ed.2d 878 and Minich v. U.S., 99 S.Ct. 3105, 443 U.S. 914, 61 L.Ed. 878	1
Brauhn v. Brauhn, 518 P.2d 1089, 10 Wash.App. 61	1
State v. Madry, 504 P.2d 1156, 8 Wash.App. 592	1
State v. Vanderveer, 196 P.650, 115 Wash. 184	1
Hayes v. Long	3
Barnett v. Ashmore, 31 P. 466, 5 Wash. 163	3
Burgess v. Towne, 538 P.2d 559, 13 Wash.App. 954	3
Farmers Union Co-op. Brokerage v. Palisade Farmers Union Local No. 714, N.D., 7 N.W. 2d 293,295 Tozier v. Woodworth, 188 A. 771, 773, 135 Me. 46	1
Pittsburgh Iron & Steel Foundries Co. v. Seaman-Sleeth Co., D.C.Pa., 236 F. 756,757	1

The main issue at hand is can a Judge operate without color of law as the original court Judge. Judge Allendoerfer was the attorney during the period of the lawsuit for Tulalip Estates, the outside Entity of MacPheson's Etal and Fisher Properties Inc. Judge Allendoerfer never disclosed this fact nor did he recuse himself from the case. He did, however, declare this entity to be " for all intense and purposes Defunct." Plaintiffs contention is that he is barred from being the Judge in this case by both State Rcw 2.28.030 and 28 USC 455 1(b). He was asked specifically if he work on or for Fisher Properties Inc. in open Court by Plaintiffs, but Judge Allendoerfer refused to answer. The supporting evidence for the above allegation was obtained in Federal Court and the State Appellate Court refused to consider it, and the State Supreme Court denied hearing it.

The Plaintiffs' contention is that the actions of the Defendants and Judge Allendoerfer are premeditated violations of the 14th Amend to the Constitution and Acts of the Federal Legislature and the State Legislature. In order to defeat, the Independent Personal Stake, which would bring rise to the Independent Contractor Status of the Plaintiffs as per their contract, Judge Allendoerfer had to declare Tulalip Estates Partnership defunct. The Federal record shows that Tulalip Estates was not **Defunct** at any time. Judge Allendorfer made a "**Mythical Decision** " as He wished it was. His Decision can not be support by fact or by the arguments in this cases. Judge Allendoerfer is more than Bias. Judge Allendoerfer has obstructed Justice in his own Court with silence help of the Defendants. Further, Judge Allendoerfer refused to allow the Plaintiffs to add Fisher Properties Inc. into the State Court Suit and he never disclosed he work for their Interest Tulalip Estates; hence, he could protect both MacPherson Etal and Fisher Etal.

The Denial to add the information into the file to impeach Judge Allendoerfer by the State Appellate Court and the State Supreme Court is a violation of their own Rules RAP 17.2. Due Process of law could not have taken placed. Next, the documents which Judge Allendoerfer ordered to be restored to the file and which the Appellate Court Judge Ellis order him to review and restore to the file are not yet in the file as of June 20, 1997; hence, the Appellate Court and State Supreme Court could not have reviewed. The State does not have a true record as Order by Judge Ellis of the Appellate Court. The Plaintiffs were barred from putting in anything to the file by Judge Knight of Superior Court except through Counsel, or by themselves if Pro Se. Material errors have occurred in this case which bar the possible of an unbias Court. Without an unbias Court, it is impossible for the 14th Amendment to the Constitution right to **Equal Protection of the law and Due Process to occur.**

This case has many findings of fact by the State Appellate Court which are not true and contrary to the record and all State Records. Prior to going back to MacPherson's, Inc. Mr. Lewis was the Broker for Wallace & Wheeler, the other broker in Lynnwood which was run out of business by the MacPherson's, Inc. Defendants' Counsel wrote a letter which stated if we continued to object that MacPherson's, Inc. would terminate our association. Mr. Mus has the same contract that Plaintiffs had. The CRB of Mr. Mus and that of His Company Contempra Homes Inc. CRB to Both Windermere and MacPherson's, Inc. does not meet the standards of RESPA and this was complained of from the beginning. Contempra Homes Inc. controls the new construction listing in the

Lynnwood market. The President's wife is the Broker/ owner of Windermere/Alderwood in the City of Lynnwood and has had that position since 1990. The other officer/owner of Contempra Homes Inc. is Mr. Alfred Mus, brother of the President of Contempra Homes Inc. The relationship give rise to non arms-lenght appraisal since these CRB are never disclosed to any one but the buyer at closing per DOL of Washington. Note that the Appelate Court never talks about these **CRB "Independent Personal Stake** of MacPherson's, Inc. or Alfred Mus, which per **Holter v. Moore** plaintiffs would have to be Independant Contractor not "**Involuntary Employees**". **Harstad v. Frohl 41 Wn. App. 294** dealt with a single office and only one seller, but here we are dealing thousands of buyers deceive by the only New Construction agent in the #1 office in the State of Washington per the defendants.

WE pray that the Court in it wisdom can see our points and grant us our Writ.

Respectfully Yours,

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"1. What is the name of the individual(s) who retained Judge Allendoerfer for the Tulalip Estates matter?
2. What are the names of the MacPherson individuals (clients of Judge Allendoerfer) in the Tulalip Estates matter?"

" 1. **Purpose of Declaration .** Attached hereto is a letter from Nancy E. Douglas to Edward W. Pettigrew, Fisher Properties Inc's attorney, dated February 7, 1995. In that letter, Ms. Douglas poses certain questions. This Declaration is for the purpose of answering those questions.

2. **Background .** This Declaration is based upon my personal knowledge and sets forth facts that would be admissible in evidence. I am competent to testify to the matters stated herein.

3. **Answers to Questions.** Following are the answers to the questions posed by Ms. Douglas. The numbered answers below correspond to her numbered paragraphs.

1. William W. Krippaehne, Jr.
2. None"

THE COURT: This is the case of Darling and Lewis v. MacPherson's Inc. It comes before the Court for cross-motions on summary judgment. Let me make a preliminary comment about this case before I hear from any of the parties.

The name MacPherson's Inc. is familiar to me. When I was a practicing attorney, I represented MacPherson's, Inc. in a short-lived matter on the Tulalip Indian Reservation or immediately adjacent to the Tulalip Indian Reservation.

That was probably between the late part of 1989 and the end of 1990. The development didn't progress while I was still in private practice, and I turned my file over to the client when I went on the bench effective January 1, 1991.

My involvement was as a land use specialist. I was assisting the client in dealing with County environmental concerns and dealing with county personnel. I, at one occasion, had the opportunity to meet Murdoch MacPherson, but he wasn't an active participant in any of the other attorney-client meetings.

This assignment that I had was totally unrelated to the MacPherson Realty operation and seemed to be a side line activity of the corporation, where they were in the process of developing new property into plats for future development.

Because of this connection and because of this disclosure I've made to you of everything I can remember about the case,

Mr. Lewis stated in Open Court.

"Is there a development situation with MacPherson's?

Yes, you testified prior----- Testified is probably the wrong word. You noted before this all started back in January that

you worked for a company called MacPherson's out on a property on the reservation. But when you check that property out you actually were working on property that was Fisher Properties Inc., which is a separate corporation. So was it the MacPherson's you were working for or was it Fisher Properties Inc. you were working for? Who knows? Or was it MacLand?"

'The Court refused to answer.'

"PARTNERSHIP AGREEMENT

This AGREEMENT, made and entered into by and between TROOTWOOD, INC. a Washington corporation ("Trotwood), and DYNES-MacPHERSON, a joint venture consisting of George Dynes and MacPherson's, Inc. a Washington corporation.

The parties to this Agreement desire to form a general partnership to jointly engage in the business of developing real estate."

"Amendment of Partnership Agreement

This Amendment of the Partnership Agreement is made and entered into as of March 1, 1992. By virtue of a Partnership Agreement dated October 10, 1978 (the 'Partnership Agreement'), two parties, namely Trotwood, Inc. (a Washington Corporation) and Dynes- MacPherson, a joint venture composed of George M. Dynes and MacPherosn's Inc., predecessor in interest to MDM Management, Inc. (a Washington Corporation), entered into a partnership to be conducted under the name and style of Tulalip Estates."

Court in Judge Allendoerfer's Ruling:

" I want to elaborate a little more on this conclusion because I understand it is important to the plaintiffs. Mr. Lewis, particularly, wanted to add his own outside corporations as plaintiffs. It was my conclusion from reviewing the evidence and his proposed third amended complaint, that his corporations couldn't qualify as consumers affected by an alleged unlawful restraint of trade. I didn't find evidence that his corporations were in any sense competing with the outside corporations of the MacPherson parties. In fact, I didn't find that at any time material to this cause of action that MacPherson's outside corporations were competing with anyone. They were for all intents and purposes, defunct entities."

The State of Washington to: The Superior Court of Washington in and for Snohomish County.

This is to Certify that the opinion of the Court of Appeals of the State of Washington, Division 1, filed on August 19, 1996, became the decision terminating review of this court in the above entitled (No. 34479-0-I & Superior Court No. 92-2-03364-8) case on April 10,1997. An order denying a motion for reconsideration was entered on September 17, 1996. An order denying a petition for review was entered in the Supreme Court on April 2, 1997. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Baker, C.J.- Wesley Darling and David Lewis appeal the summary judgment of their claims against MacPherson's, Inc. and Alfred Mus. Darling and Lewis argue that material issues of fact preclude summary judgment on their claims for breach of contract, restraint of trade, and wrongful termination. They also argue that the trial court abused its discretion by failing to grant them leave to file a third amended complaint which sought to add plaintiffs and defendants and reformulate their restraint of trade claim. We hold that the trial court did not abuse its discretion by denying the third amendment, and summary judgment dismissal was appropriate.

Facts

Darling and Lewis were both agents at the Lynnwood office of MacPherson's before termination in 1992. Darling had been an agent with MacPherson's, sitting new housing developments, for fifteen years. Lewis had been associated with MacPherson's sporadically since 1980, beginning in the Everett office. He had most recently rejoined the Lynnwood office in 1990.

Both Darling and Lewis had a written associate agreement with MacPherson's, which they alleged was breached by the Lynnwood manager's refusal to allow them to list new construction. They negotiated with MacPherson's management, seeking a new construction program of their own, and eventually filed an action against MacPherson's office manager Mus, and other individual defendants, alleging restraint of trade. At about the time this conflict arose, Darling and Lewis discovered that Mus had an undisclosed ownership interest in one the builders that listed new developments with the Lynnwood office. Darling and Lewis reported this alleged violation of disclosure laws to management.

Darling and Lewis were eventually terminated from the Lynnwood office, after being encouraged to seek positions with other offices. They later filed a second amended complaint, adding breach of contract and wrongful termination claims. They also filed numerous complaints about Mus and MacPherson's with several state and federal entities.

All of appellants' claims in this action were dismissed on summary judgment.

Discussion

RAP 9.11 motion to supplement the record

Appellants have filed numerous motions with this court, including to disqualify the trial court judge, to restore the record, and to supplement the record. All motions have been denied except the latest motion to supplement the record, which was passed to the merits, apparently because it was made shortly before oral argument. That motion seeks to supplement the record under RAP 9.11 with a letter from the Department of Licensing regarding

appellants' complaint about agent Mus' practice of not disclosing his ownership in a building company.

RAP 9.11 allows new evidence if, among other requirements, it is necessary to fairly resolve the issues on review and would probably change the outcome. The letter is not new evidence, but merely reiterates the facts surrounding the complaint to DOL are not relevant to any of their arguments on appeal. They do not allege that this complaint caused their termination, and they do not make any claim based on Mus's nondisclosures. Appellants' motion to supplement the record is denied.

Breach of contract claim

Appellants argue that material issues of fact preclude summary judgment dismissal of their breach of contract claim. Although their argument on appeal is unclear, it appears from the pleadings that appellants argue that the "equal facilities" clauses in their contracts with MacPherson's, coupled with oral agreements and the 1988 policy manual, gave them a right to list new construction at the Lynnwood office.

Neither of the " equal facilities " clauses can be read as giving agents the right to list new construction. One of the clauses refers specially to office facilities. The other clause is in a paragraph about broker support, and states " the Broker shall provide the Sales Associate the use of office facilities, time, and services equal to that of all other such employees."

Nor have appellants provided any evidence of an oral agreement regarding new construction listings. In Lewis' deposition referred to by appellants in their reply brief, Lewis states that he discussed a 1988 policy manual with Mus before returning to the Lynnwood office, and Mus said he wanted Lewis to come back to work on land sales.

This does not amount to a promise to allow new construction listings.

Similarly, none of the 1988 manual excerpts in the record contain any language about the rights of sales associates to list new construction. Appellants have alleged no facts to support their breach of contract claim.

Wrongful termination claim

Appellants next argue that an issue of fact exists regarding whether they were wrongfully terminated in retaliation for their "whistleblowing " efforts. They allege they were terminated because they complained to MacPherson's management that Mus was violating disclosure laws.

The alleged acts reported by the appellants have the potential of harming the buying public, because the disclosure law protects the public from deception. However, assuming the whistleblower analysis applies and appellants have established a prima facie case, appellants' claim still fails. MacPherson's asserted that appellants were terminated because their hostility prevented them from working effectively within the Lynnwood office. Because MacPherson's brought forth a legal reason for the termination, the burden shifted back to appellants to show that the proffered reason was a pretext. Appellants failed to do so. The trial court correctly ruled that appellants' wrongful termination claim failed as a matter of law.

Consumer Protection Act claims

Appellants also argue that their claims under the Consumer Protection Act should not have been dismissed. They argue on appeal that the fact they are not consumers is not fatal to their claims, because their status as competitors gives them at least a claim for unfair trade practices under RCW 19.86.020.

Initially, we reject MacPherson's argument that the dismissal of CPA claims was not timely appealed. The order dismissing these claims not final and appealable under CR 54 (b) , because it did comply with that rule. Furthermore, the trial court revisited these claims during the final summary judgment hearing, before entering a final order dismissing all of the remaining claims.

Although timely appealed, appellant's unfair trade practices claim nevertheless fails. The CPA applies only to acts or practices which are harmful to the public interest. Appellants' claim is based on the practice of the Lynnwood office disallowing most of its agents the opportunity to serve as listing agents on new housing developments. The practice of one office of a real estate agency, retraining most of its agents from obtaining a listing commission for newly constructed homes, does not affect the public interest. The public is not thereby denied access to new construction listings. Even if Lewis's development company was a plaintiff, as would be the case in third amended complaint, the Lynnwood office of MacPherson's is not capable, by the act allegedly wrongfully committed, of restraining trade to the detriment of the public.

Third amended complaint

Finally, appellants argue that the trial court erred by denying them leave to file a third amended complaint. Leave to amend is freely granted when justice so requires, and the trial court's decision on a motion to amend pleadings is generally reviewed only for abuse of discretion.

We reject MacPherson's' argument that this is not reviewable because the trial court's denial of the motion to amend is not designated in the notice of appeal. The order was entered simultaneously with the final summary judgment order, and is logically encompassed in the final decision of the court.

However, we also hold that the trial court did not abuse its discretion by denying appellants leave to file the third amendment to their complaint. The amendment sought to reallege a cause of action already dismissed, without curing the defect in the prior allegations. The amended restraint of trade cause of action would fail for the same reason the original restraint of trade claim failed: its not a matter of public interest. Also, the proposed amendment was sought almost two years after the original complaint, simultaneously with cross motions for summary judgment. Justice is not served by a never ending cycle of amendments, discovery, and partial summary judgments, with no resolution of the underlying dispute.

We affirm the trial court's dismissal of all claims, and deny appellants request for fees.

All five members of Department I of the Court considered the matters set on its April 1, 1997, Motion Calendar, and unamimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.
April 2, 1997 C.J. Merritt, Clerk